ATTORNEYS FOR APPELLANT:

APRIL L. BOARD
TYLER J. BELLIN
April L. Board, P.C.
Merrillville, Indiana

ATTORNEYS FOR APPELLEE:

RICHARD J. LESNIAK
WILLIAM M. MURAKOWSKI
Lesniak and Murakowski
Schererville, Indiana

IN THE
COURT OF APPEALS OF INDIANA

IN RE THE MARRIAGE OF:	)	
	)	
JEFFREY W. MORROW,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 45A03-0606-CV-285
	)	
APRIL B. MORROW,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Thomas W. Webber, Sr., Judge Pro Tempore
Cause No. 45D03-0305-DR-562

April 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Jeffrey W. Morrow ("Husband") appeals several aspects of the trial court's order regarding the dissolution of his marriage to April B. Morrow ("Wife"). We affirm in part and vacate in part.

Issues

We reorder and restate Husband's issues as follows:

I. Whether the trial court abused its discretion in allowing the parties' children to choose whether to spend overnights with Husband;

II. Whether the trial court abused its discretion in finding that Husband dissipated marital assets;

III. Whether the trial court abused its discretion in valuing Husband's corporation;

IV. Whether the trial court erred in allowing Wife to petition for a modification of child support upon a ten-percent change in Husband's obligation under the Indiana Child Support Guidelines; and

V. Whether the trial court abused its discretion in ordering Husband to pay $10,000 of Wife's attorney's fees.

Facts and Procedural History

Husband and Wife were married in June 1979. Two children were born of the marriage: E.M., who is now emancipated, and A.M., born in March 1988. In 1995, Husband and Wife adopted J.M., who was born in November 1994. Husband fathered a son out of wedlock—Jo.M., born in May 1999—and paid $1,000 per month in support to Jo.M.'s mother, with whom Husband now lives in Chicago, Illinois. Husband and Wife separated sometime between 1995 and 2003.

On May 9, 2003, Wife petitioned to dissolve the marriage. Judge James Danikolas held a final hearing in July 2004 and May 2005 and died before entering a final order. On March 22, 2006, Judge Pro Tempore Thomas W. Webber, Sr., granted Wife's petition for a trial de novo, which was held on April 27, 2006. On May 4, 2006, the trial court entered an order dissolving the parties' marriage and directing the parties to submit proposed findings and conclusions regarding custody, visitation, and property distribution. On June 8, 2006, the trial court entered an order containing numerous detailed findings of fact and conclusions thereon. Husband's appeal ensued.[1]

Discussion and Decision

General Standard of Review[2]

Where, as here, a trial court enters findings of fact and conclusions thereon pursuant to Indiana Trial Rule 52(A), we apply a two-tiered standard of review. *Granzow v. Granzow*, 855 N.E.2d 680, 683 (Ind. Ct. App. 2006).

> We first determine whether the record supports the findings and, second, whether the findings support the judgment. The judgment will only be reversed when clearly erroneous, i.e. when the judgment is unsupported by the findings of fact and the conclusions entered upon the findings. Findings of fact are clearly erroneous when the record lacks any evidence or reasonable inferences from the evidence to support them. To determine whether the findings or judgment are clearly erroneous, we consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom, and we will not reweigh the evidence or assess witness credibility.

Id. (citations omitted).

[1] After Husband filed a notice of appeal, Wife filed, and the trial court granted, a motion to correct error regarding the calculation of Husband's child support obligation, which is not at issue in this appeal.

I. Overnights with Husband

The trial court made the following findings regarding custody and visitation:

> 7. The children continue to reside with [Wife] in Munster, Indiana. They have attended school at the Munster Public Schools. [A.M.] is a graduating senior in high school and has been accepted at Indiana University Northwest Campus in Gary, Indiana; and, [J.M.] is in 5th grade.
>
> 8. Over the past six months to a year neither child has spent overnights in Chicago; when [J.M.] has gone for an overnight, he usually calls [Wife] to come and get him before the night is over.
>
> 9. [Husband's] Parenting Time with either child is presently limited to several hours at a time, once, sometimes twice a week or less. However, [Husband] has supplied the children with cell phones and he talks to each several times weekly[, sometimes] several times daily, depending on what is happening in each of the [children's] lives. [Husband] also attends the children's extra-curricular activities as his schedule permits.
>
> 10. After [Husband's] last Parenting Time with [A.M.], where they discussed her college education, among other things while in his car parked at [Wife's] house, [A.M.] had an emotional outburst that required hospitalization; [A.M.] is presently in counseling. [Husband] describes [A.M.'s] emotional problems as a typical teenager trying to manipulate the situation; and, as an angry teen when she doesn't get what she wants. [Wife] does not dispute [Husband's] conclusion in this regard.
>
> 11. Overnight Parenting Time by the children with [Husband] seems to have broke[n] down when he introduced [them] to his illegitimate son, [Jo.M.], then about four (4) years old. [Husband's] paternity of [Jo.M.] was established in Cook County Circuit Court, February 16, 2005.
>
> 12. Presently residing in [Husband's] house in Chicago is his son [Jo.M.], his present lady friend and her two (2) children. [Husband's] lady friend's children have their own bedrooms at [Husband's] house, as does his son [Jo.M.]. On any overnight Parenting Time, [A.M.] or [J.M.] would have to double up with or use those other children's bedrooms.
>
> 13. [Husband's] physical Parenting Time with [A.M.] and [J.M.] revolve[s] around [Husband's] need to be in Chicago available for work. During the marriage and up until the divorce was filed [Husband] was involved in all aspect[s] of the children's lives, educational, extra-curricular

[2] We remind Husband's counsel that the argument section of an appellant's brief "must include for each issue a concise statement of the applicable standard of review; this statement may appear in the discussion of each issue or under a separate heading placed before the discussion of the issues." Ind. Appellate Rule 46(A)(8)(b).

> and medical. He and [Wife] jointly made decisions [a]ffecting the children's lives.
>
> 14. It is in the best interest of the children, [A.M.] and [J.M.], that physical custody be granted to [Wife]; that [Husband] have reasonable rights of Parenting Time on forty-eight (48) hours prior notice; overnights and weekends with [Husband] as the children express a desire to do so. However, it is also in the best interest of the children that [Husband] continue to be involved in making decisions affecting the children and should therefore be granted joint legal custody.

Appellant's App. at 104-05 (citation omitted).

Husband challenges the trial court's decision to allow the children to choose whether they will spend overnights with him. Indiana Code Section 31-17-4-1(a) provides that a noncustodial parent is entitled to "reasonable parenting time rights[.]" "When we review a trial court's determination of a parenting time issue, we reverse only when the trial court manifestly abuses its discretion." *J.M. v. N.M.*, 844 N.E.2d 590, 599 (Ind. Ct. App. 2006) (footnote omitted), *trans. denied*. "An abuse of discretion occurs if the court's decision is clearly against the logic and effect of the circumstances before it or if it has misinterpreted the law." *Nowels v. Nowels*, 836 N.E.2d 481, 488-89 (Ind. Ct. App. 2005). "No abuse of discretion occurs if there is a rational basis in the record supporting the trial court's determination. We will neither reweigh evidence nor judge the credibility of witnesses. In all parenting time controversies, courts are required to give foremost consideration to the best interests of the child." *J.M.*, 844 N.E.2d at 599 (citations omitted).

Husband quotes the following commentary from the Indiana Parenting Time Guidelines:

> The rearing of a teenager requires parents to make decisions about what their teen should be allowed to do, when, and with whom. At the same time, parents who live apart may have difficulty communicating with each other.

> If parents are not able to agree, the teenager, who very much wants freedom from adult authority, should never be used as the "tie breaker."

Ind. Parenting Time Guideline § II(C) cmt. 3. Husband does not specifically challenge the correctness of the trial court's findings on this issue, but instead argues that "placing the decision in the hands of children as to spend the night with [him], especially in light of [Wife's] animosity pertaining to the child born out of wedlock, is making the children in this case the 'tie-breaker' contrary to recommendations of the Indiana Parenting Guidelines." Appellant's Br. at 11.

Wife notes that the aforementioned commentary is not "an enforceable rule[,]" Appellee's Br. at 10, and further observes that the purpose of the Parenting Time Guidelines "is to provide a model which may be adjusted depending upon the unique needs and circumstances of each family." Ind. Parenting Time Guideline, Preamble. The trial court's order does not, as Husband contends, force the children "to take sides with one parent or another." Appellant's Reply Br. at 2. Rather, it reflects an awareness of and sensitivity to the "unique needs and circumstances" of Husband's blended family and the best interests of A.M., who is now nineteen years old and experiencing emotional problems, and J.M., who had previously chosen not to spend overnights with Husband. In sum, Husband has failed to establish an abuse of discretion here.

II. Husband's Dissipation of Marital Assets

Husband "is, and has for many years, been self-employed as a voice-over performer, jingle writer and singer for commercials and advertising." Appellant's App. at 106 (finding 17). Husband is also the sole shareholder of J.W. Morrow Productions, Inc. Husband is a

member of two unions, AFTRA and Screen Actors Guild, which reported "that for pension purposes, [Husband] has earned over $7,898,279.00 from 1983 [through mid-2003]. This is an average of almost $395,000 for each year over almost 20 years." *Id*. (finding 18). According to the trial court, Husband's current income was "difficult if not impossible to determine from W2's, 1099's, and testimony presented[, inasmuch as Husband's] tax return[s] for 2003, 2004 and 2005 have not been filed." *Id*. (finding 19). Based on Husband's testimony, the trial court found that his average gross income for 2003 through 2005 was $185,567.86. *Id*. (finding 23).[3]

Wife is a tenured public school teacher and the musical director for her church and had an average gross income for 2003 through 2005 of $74,367.67. *Id*. (finding 22). The trial court found that during their marriage, Husband and Wife

> lived a lavish lifestyle with homes in Chicago, Las Vegas and Indiana. The parties have acquired assets and as [Husband's] income became insufficient to continue their lifestyle, they subsequently acquired some debt. What is not clear to the Court, from the testimony presented, is how much [Husband's] Chicago "family" contributed to his inability to continue the life style he and [Wife] enjoyed.

Id. at 107 (finding 30).

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[3] The trial court found that

> [n]o clear, concise or cogent evidence was presented as to income, commission paid or business expenses and deductions from [Husband's] income for 2003, 2004 and 2005. Consequently, the Court has insufficient evidence to accurately determine the amount of gross income for [Husband] for years 2003, 2004 and 2005. The figures used below are from testimony presented and may be subject to revision and modification when actual figures are learned from [Husband's] income tax returns when they are filed.

Appellant's App. at 106 (finding 20).

Pursuant to Indiana Code Section 31-15-7-5, a trial court "shall presume that an equal division of the marital property between the parties is just and reasonable." This presumption may be rebutted by a party who presents relevant evidence that an equal division would not be just and reasonable, including evidence concerning the earning ability of the parties as related to a final division of property and "[t]he conduct of the parties during the marriage as related to the disposition or dissipation of their property." Ind. Code § 31-15-7-5(4). The trial court determined that Husband had dissipated marital property in the following respects:

> a. To support his son [Jo.M.], a child born in 1999, out of wedlock during [the parties'] marriage, [Husband] has paid $42,000 in support to the child's mother and continues to support the child since he obtained physical custody.
>
> b. In 2000, [Husband] caused $220,000.00 to be removed from his Prudential Retirement Account for his company to purchase his then living unit, which unit was later sold by [Husband] in his individual name. The funds or property were never replaced into the retirement account. No adequate explanation of the use of the funds received by [Husband] in 2000 for the sale of his condo to his company, nor the funds received by [Husband] when he mortgaged the condo in 2002, were presented to the Court.
>
> c. An additional $94,000.00 was transferred from the [Prudential] Retirement Account in August, 2000, and cannot be found. [Husband] says he paid bills.
>
> 18. [Husband] testified that 2000 was a difficult year financially, because [his industry and unions] were on strike from May to November. In 2000, [Husband] had his retirement account purchase his condo and pay-off the mortgage (he remortgaged it about a year or so later), he sold a house in Vegas but immediately replaced it with another. His pension funds report his income for 2000 as $368,989.00.[4]
>
> 19. The Court concludes that because of the vast disparity in future earning ability of the parties and because [Husband] has dissipated without explanation $356,000 in marital property since 1999, an equal division of marital property would not be just and equitable; and, that [Wife] should be awarded a greater portion of the marital property than [Husband].

Id. at 118-19.

Husband challenges the trial court's finding that he dissipated marital assets, which was one justification for awarding Wife a greater portion of the marital estate. "Our court reviews findings of dissipation in various contexts under an abuse of discretion standard." *Goodman v. Goodman*, 754 N.E.2d 595, 598 (Ind. Ct. App. 2001) (citing *In re Marriage of Coyle*, 671 N.E.2d 938, 942 (Ind. Ct. App. 1996)). As such, we will reverse only if the trial court's decision is clearly against the logic and effect of the facts and the reasonable inferences to be drawn from those facts. *Goodman*, 754 N.E.2d at 598. "On review, we may not reweigh the evidence or assess the credibility of witnesses, and we consider only the evidence most favorable to the trial court's disposition of marital property." *Coyle*, 671 N.E.2d at 942.

Dissipation has been described as "the frivolous, unjustified spending of marital assets which includes the concealment and misuse of marital property. It generally involves the use or diminution of the marital estate for a purpose unrelated to the marriage and does not include the use of marital property to meet routine financial obligations." *Id*. at 943 (citation omitted). The court should assess whether the expenditures were excessive or *de minimis*. *Id*. The test for dissipation is whether the assets were "actually wasted or misused." *Id*. at 944.

The trial court's findings, which Husband does not specifically dispute, indicate that Husband paid $42,000 to support a son born out of wedlock, which is by definition a purpose unrelated to the marriage. The findings also indicate that Husband was responsible for the

[4] Husband's income tax return reports his gross income for 2000 as $18,416. Appellant's App. at 114 (finding 66).

disappearance of an additional $314,000 in marital assets, $220,000 of which facilitated a real estate transaction involving Husband's corporation. Husband offered no suitable explanation for the whereabouts of those funds, and the trial court was well within its discretion to disbelieve, albeit implicitly, Husband's self-serving and unsupported testimony that he used the remaining $94,000 to pay bills. Husband's contention that the missing money was used to support the family's lavish lifestyle is simply an invitation to reweigh the evidence and draw inferences in his favor, an invitation we must decline. In sum, we find no abuse of discretion.

III. Valuation of Husband's Corporation

The trial court determined that Husband

> shall have the exclusive right, title, interest, use and possession to J.W. Morrow Productions Inc. and all of its present and former assets and equipment. The Court values the assets of J.W. Morrow Productions at $160,352.00 less the $47,314.00 from the sale of the #513 Condo unit, and less the $56,000.00 debt to Bank One, for a net value of $57,038.00; and values the equipment at $42,179.00. Total Corporate value $99,217.00.

Appellant's App. at 121.

Husband contests the trial court's valuation on several grounds. We note that trial courts are invested with broad discretion in determining the value of marital property. *In re Marriage of Lewis*, 638 N.E.2d 859, 860 (Ind. Ct. App. 1994). We will find no abuse of discretion if sufficient evidence exists to support the valuation. *Id.* "The burden of producing evidence concerning the valuation of the assets lies with the parties to the proceedings." *Id.* "Where the parties fail to present evidence as to the value of assets, it will

be presumed that the trial court's decision is proper." *Quillen v. Quillen*, 671 N.E.2d 98, 103 (Ind. 1996).

Husband first contends that his corporation "ceased doing business" as a corporation in 2003 and 2004. Appellant's Br. at 17 (quoting Tr. at 120).[5] Be that as it may, we agree with Wife that simply because the corporation ceased doing business does not mean that it "was dissolved and that the assets were distributed or disappeared." Appellee's Br. at 21.

Next, Husband claims that no evidence was introduced that the assets "even still existed at the time of the filing of the divorce." Appellant's Br. at 18. Husband further claims that in valuing the assets, the trial court relied on tax documents which, his accountant testified, did not reflect the assets' fair market value. Also, Husband contends that the trial court double-counted the equipment value.

Absent contrary evidence, we decline to speculate that the corporate assets did not exist when Wife petitioned for dissolution. We also note that Husband failed to introduce evidence regarding the assets' fair market value and therefore cannot complain about the trial court's valuation. Finally, we observe that Husband's arguments are based on documents that were not offered into evidence at trial and do not appear in the record before us on

[5] Husband relies on the testimony of his accountant, who, when asked in which year the corporation stopped doing business, replied, "I think it was probably a transition, probably 2003, 2004 would be my guess. I think you would have to ask [Husband] to be exact or I would have to go back to the records to check." Tr. at 120. As such, Husband's evidence regarding the cessation of corporate operations is inconclusive at best.

appeal.[6] "It is a cardinal rule of appellate review that the appellant bears the burden of showing reversible error by the record, as all presumptions are in favor of the trial court's judgment." *Marion-Adams Sch. Corp. v. Boone*, 840 N.E.2d 462, 468 (Ind. Ct. App. 2006). Husband has failed to meet his burden here.

IV. Modification of Husband's Child Support Obligation

The trial court's order directs Husband to pay child support and states that "[a] modification of this support order may be made at any time such modification would result in a 10% or more change in the amount of support." Appellant's App. at 120 (paragraph 9 on page 18 of trial court's order). Husband claims that this portion of the order is contrary to statute. We agree.

Indiana Code Section 31-16-8-1 states in pertinent part that with respect to child support orders,

> modification may be made *only*:
>
> > (1) upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable; or
> >
> > (2) upon a showing that:
> >
> > > (A) a party has been ordered to pay an amount in child support that differs by more than *twenty percent* (20%) from the amount that would be ordered by applying the child support guidelines; and
> > >
> > > (B) the order requested to be modified or revoked was issued at least twelve (12) months before the petition requesting modification was filed.

(Emphases added.)

[6] The trial court's order and the parties' briefs indicate that the documents are included in Exhibit 7, which was reviewed by Husband's accountant at trial but was not offered into evidence. Exhibit 7 does not appear in the exhibits volume filed with this Court or in Husband's appellant's appendix. Wife's brief suggests that Exhibit 7 appears in an appellee's appendix, which was not filed with this Court. *See* Appellee's Br. at 22 (citing to appellee's appendix).

It is well settled that "[c]ourts are obliged to respect the plain language of a statute." *Sholes v. Sholes*, 760 N.E.2d 156, 159 (Ind. 2001). We are sensitive to the concerns of the trial court and Wife that Husband's gross income (and thus his child support obligation) was impossible to calculate accurately because of his failure to timely file his income taxes, but such concerns may not override the plain language of Indiana Code Section 31-16-8-1.[7] We therefore vacate paragraph 9 on page 18 of the trial court's order.

V. Attorney's Fees

Last, we address Husband's contention that the trial court erred in ordering him to pay $10,000 of Wife's $34,133 in attorney's fees "for the prosecution of the discovery process and the prosecution of this action[.]" Appellant's App. at 122. Pursuant to Indiana Code Section 31-15-10-1(a), a trial court may order a party to "pay a reasonable amount for the cost to the other party" of maintaining a dissolution proceeding, "including amounts for legal services provided[.]" In determining a reasonable attorney's fee award, the trial court should consider the parties' "respective resources, economic condition, ability to engage in gainful employment and earn an adequate income, and other such factors that bear on the reasonableness of an award." *Gillette v. Gillette*, 835 N.E.2d 556, 564 (Ind. Ct. App. 2005).

> In reviewing a trial court's award of attorney's fees, we apply an abuse of discretion standard. A trial court has wide discretion in awarding attorney's fees. We will reverse such an award only if the trial court's award is clearly against the logic and effect of the facts and circumstances before the court. The trial court may look at the responsibility of the parties in incurring the

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[7] We note that the trial court properly reserved the right to revise and modify its determination of Husband's gross income "when actual figures are learned from [his] income tax returns when they are filed." Appellant's App. at 106 (finding 20).

> attorney's fees. Furthermore, the trial judge possesses personal expertise that he or she may use when determining reasonable attorney's fees

Mason v. Mason, 775 N.E.2d 706, 711 (Ind. Ct. App. 2002) (citations omitted), *trans. denied* (2003).

Here, both Husband and Wife received hundreds of thousands of dollars in assets in the dissolution. That said, the trial court found that from 2003 to 2005, Husband's self-reported average gross income was nearly two and one-half times that of Wife's well-documented average gross income. We also note that the trial court ordered Husband to pay less than one-third of Wife's attorney's fees. Under these circumstances, we find no abuse of discretion.

In conclusion, we vacate paragraph 9 on page 18 of the trial court's order and affirm the order in all other respects.

Affirmed in part and vacated in part.

BAKER, C. J., and FRIEDLANDER, J., concur.